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No. 07-526

In The
Supreme Court of the United States

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and TOWN OF CHARLESTOWN, RHODE ISLAND,

Petitioners,

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of Interior, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF OF PETITIONER TOWN OF CHARLESTOWN, RHODE ISLAND

JOSEPH S. LARISA, JR.
Assistant Solicitor for Indian Affairs
TOWN OF CHARLESTOWN
55 Dorrance Street, Suite 301B
Providence, RI 02903
(401) 743-4700
joe.larisa@verizon.net

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF OF PETITIONER TOWN OF CHARLESTOWN

In an effort to inject ambiguity into an otherwise straightforward temporal limitation contained in Section 479 of the Indian Reorganization Act (the "IRA" or "1934 Act"), the Secretary unleashes a flurry of arguments to support an interpretation of "now" in the IRA as meaning "later." Outside of this litigation, however, the Secretary has for more than 70 years consistently interpreted Section 479 as including only "recognized [in 1934] tribes now under federal jurisdiction." The Secretary's longstanding agreement with Petitioners' interpretation of the IRA is evidenced by the Secretary's own newly disclosed legal opinions as well as administrative practice.

Perhaps the most persuasive interpretation by the Secretary was the one made closest in time to passage of the 1934 Act, by the principal drafter of both the Act and the very language at issue here – an interpretation that was actually applied by the Secretary to the Narragansett Indian Tribe itself. On March 7, 1936, Commissioner John Collier authored a Department "Circular" interpreting the IRA in precisely the same manner as Petitioners. A year later (three years after passage of the IRA), the Secretary applied the temporal limitation to the Narragansett, informing the Tribe that no act of Congress applied to it. The interpretation of Section 479 by the IRA's architect, as including only members of "a recognized tribe that was under Federal jurisdiction at the date of the Act," has been followed by

the Secretary to the present almost without exception, and is demonstrably correct. The Secretary's recent reinterpretation of Section 479 is wrong.

The Secretary places great reliance on 1980 trust acquisition regulations, which he claims interpret Sections 465 and 479 of the IRA as applicable to all federally recognized tribes, and not just to those federally recognized and under federal jurisdiction in 1934. He asserts that these regulations are entitled to substantial deference. These regulations are entitled to no such deference. First, Congress never authorized the Secretary to promulgate regulations relating to either Section 465 or 479, even though it specifically authorized regulations pursuant to four other sections of the IRA. Second, the regulations nowhere define "Indian" differently than the limited definition contained in Section 479 (they define only "tribe" and "Individual Indian"). Third, the regulations expressly require and relate back to "the provisions contained in" an act of Congress authorizing trust. Here, that act is the IRA, and its Section 479 definition of "Indian" excludes the Narragansett.

Indeed, the Secretary has been adhering to the temporal limitation of Section 479 since the moment the IRA was first enacted. For at least the first 46 years after passage of the IRA, the Secretary did not take land into trust for a single Indian tribe that was not recognized and under federal jurisdiction in 1934.

Since then, the Secretary has taken only one administrative action inconsistent with this position.[1] There is no sound legal basis for the Court to defer to the Secretary's interpretation of Sections 465 and 479 proffered in this case. Moreover, while the Secretary and amici argue that amendments to the IRA scuttle the "recognized [in 1934] tribe" test, no amendment changes a word of that limitation.

The Secretary also reads the Rhode Island Indian Claims Settlement Act's ("Settlement Act") extinguishment provisions far too narrowly. Effect must be given to the Settlement Act's clear extinguishment of Indian claims to sovereignty over land in Rhode Island by ensuring the continued ability of the State to apply its laws and jurisdiction to land throughout Rhode Island. That can be achieved either by prohibiting the Secretary from taking the Parcel into trust *or* by restricting any trust to prohibit the creation of Indian country and the resulting assertion of Indian territorial sovereignty. The "restricted trust" jurisdictional framework applies today on the Settlement Lands. It would defy law and logic to read the Settlement Act to permit the ouster of State laws and jurisdiction everywhere in Rhode Island except in the heart of the Tribe's ancestral home.

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[1] While the Secretary apparently took land into unrestricted trust for one tribe, the Tunica-Biloxi, that did not meet the "recognized [in 1934] tribe" test, he also denied trust for another tribe, the Stillaguamish, which did not meet that test.

Through its Indian sovereignty extinguishing provisions, the Settlement Act precludes the creation of Indian country *anywhere* in the State. That has been Rhode Island's jurisdictional paradigm since statehood. Nothing in the 1934 IRA or the 1978 Settlement Act countenances a different result.

I. THE SECRETARY'S 1980 IRA TRUST REGULATIONS ARE ENTITLED TO NO DEFERENCE

The Secretary and his amici place enormous reliance on the 1980 regulations implementing Section 465. They assert that "Congress has not unambiguously resolved" in the IRA whether the Secretary may take land into trust for an Indian tribe "without regard to whether it was recognized and under federal jurisdiction [on] . . . the date of the IRA's enactment." U.S. Br. 11. As a result, they contend, this Court must afford *Chevron* deference to the Secretary's regulations, which they claim extend his trust taking authority to "any Indian tribe . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs." 25 C.F.R. 151.2(b). Even if Sections 465 and 479 of the IRA were ambiguous (which they are not), the Secretary's reliance on the 1980 trust acquisition regulations is entirely misplaced.[2]

[2] The Secretary repeatedly refers to trust acquisitions as one of the "special programs and services provided by the United

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First, unlike four other sections of the IRA, Congress never delegated authority to the Secretary to promulgate regulations under either Section 465 or

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States to Indians," as if a trust acquisition were nothing more than a low interest loan or job training program. He claims that the provisions of the IRA authorizing trust acquisitions are ambiguous as to whether tribes recognized after 1934, like the Narragansett, are eligible. As a result, the Secretary argues, he may use his power to "fill the gap" left by Congress and apply IRA's trust acquisition provisions to all federally recognized tribes, regardless of the date of recognition. U.S. Br. 28. While this methodology might suffice to interpret a generic act governing low interest loans, it cannot be used to interpret one that divests a state of its jurisdiction and sovereignty.

Adopting the Secretary's position would more than double the number of tribes eligible for jurisdiction stripping trust under the 1934 Act (from just over 250 to more than 600). The resulting divestiture of state sovereignty over land and the unprecedented intrusion into traditional state authority requires a "clear and manifest" statement from Congress authorizing the Secretary's interpretation. *Rapanos v. United States,* 547 U.S. 715, 738 (2006) (where an agency's expansive interpretation would result in significant impingement on state and local governments' traditional and primary power over land and water use, the Court expects a "clear and manifest" statement from Congress to that effect); *see also Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159, 172-73 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power," the Court will require "a clear indication that Congress intended that result," especially where the administrative interpretation permits a federal encroachment on traditional state powers). The Secretary's claim of ambiguity is a concession that no such "clear and manifest" statement in the IRA exists to authorize the divestiture of a state's sovereignty in favor of a tribe, like the Narragansett, that was not federally recognized and under federal jurisdiction in 1934.

Section 479. Second, the regulations themselves do not resolve any statutory ambiguity in favor of permitting trust acquisitions for federally recognized tribes, regardless of status in 1934. They define "Tribe" and "Individual Indian" and refer back to the eligibility provisions of the IRA itself (or other act authorizing trust), which includes Section 479's definition of "Indian." Third, the position the Secretary takes in this case – that the regulations somehow interpret the IRA as having no temporal limitation – is belied by his clear and consistent contrary position in departmental circulars and opinions and by administrative action and inaction from the date of passage of the IRA through the commencement of this case. For these reasons, the regulations cannot be afforded substantial deference under *Chevron,* nor are they even entitled to lesser *Skidmore* deference as a "persuasive" statement of the Secretary's interpretation.

A. Congress has not Authorized the Secretary to Promulgate Regulations for Section 465 or 479 of the IRA

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). *Chevron* deference "is warranted *only* 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that

authority.'" *Gonzales v. Oregon,* 546 U.S. 243, 255-56 (2006) (emphasis added) *quoting United States v. Mead Corp.,* 533 U.S. 218, 226-27 (2001). *Chevron* deference will not be triggered merely because Congress has chosen to authorize an agency to promulgate regulations under other, unrelated, provisions of a statute. Indeed, the inclusion of regulatory authority by Congress in certain sections of a statute indicates that Congress intended to deny such authority over sections where the authority to promulgate regulations is excluded. *Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 452 (2002) (When "Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *see also Gonzales,* 546 U.S. at 258-59 (declining to find that congressional authorization for agency rulemaking pursuant to certain enumerated sections of the Controlled Substances Act extended to all provisions of the CSA).

Congress did not delegate rulemaking authority to the Secretary for all provisions of the IRA. Instead, it limited the Secretary's rulemaking authority to only four of the IRA's nineteen sections: 25 U.S.C. § 463e (permitting the Secretary to promulgate "such rules and regulations as he may prescribe" to effect certain land consolidations); 25 U.S.C. § 466 (directing the Secretary to "make rules and regulations for the operation and management of Indian forestry units"); 25 U.S.C. § 470 (authorizing the Secretary to

establish a revolving fund "under such rules and regulations as he may prescribe"); 25 U.S.C. § 472 (directing the Secretary to "establish standards of health, age, character, experience, knowledge and ability" for appointment to positions in the Indian Office). Notably absent from this list is any provision authorizing the Secretary to promulgate rules and regulations pursuant to Sections 465 or 479 of the IRA. The omission of rulemaking authority for trust acquisitions under the IRA contrasts sharply with Congress' express delegation of such authority under these other sections of the IRA. The disparate inclusion and exclusion is a clear indication that Congress did not intend for the Secretary to promulgate the trust acquisition regulations upon which he now heavily relies.

This may explain why the Secretary steers clear of any assertion that the IRA is the source of his authority to promulgate trust acquisition regulations. Instead, he relies on 25 U.S.C. § 9, a general delegation of ancient vintage that confers upon the "President" the authority to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." U.S. Br. 28. The Secretary's argument is, presumably, that the general delegation in 25 U.S.C. § 9 is sufficient to authorize the Secretary to promulgate regulations pursuant to particular statutory provisions even where, as in the IRA, Congress is presumed to have excluded such rulemaking authority. This

general delegation is, however, a slender reed upon which to hang the Secretary's power to divest Rhode Island of its sovereignty; and the passage of time and the sweep of history have made 25 U.S.C. § 9 an unreliable source of rulemaking authority for the Secretary.

Enacted in 1834, 25 U.S.C. § 9 is a relic from a period when relations with Indian tribes were governed primarily by the President, through the Department of War, and not by the Congress. Its broad delegation to the President was consistent with America's then-existing relationship with Indian tribes as sovereign nations with whom the President had plenary power to wage war or, through treaties and agreements, make peace. The general delegation contained in 25 U.S.C. § 9 was also "in keeping with a policy of almost total tribal self-government prevailing when [25 U.S.C. § 9] was passed." *Organized Village of Kake v. Egan,* 369 U.S. 60, 63 (1962) (25 U.S.C. § 9 provides no support for issuance by the Secretary of fish trap regulations permitting tribal fishing in contravention of state law).

By the time of the passage of the IRA – a full 100 years later – the primary focus of Indian policymaking had shifted from the President to the Congress,[3]

[3] Felix S. Cohen, Handbook of Federal Indian Law § 1.04 at 76-77 (N.J. Newton et al. eds. 2005) (discussing Congress' 1871 termination of the President's ability to make treaties with Indian tribes and 1919 termination of the President's power create Indian reservations by proclamation).

relations with Indians were no longer viewed through a military lens and tribes ceased to be regarded as independent sovereign nations with whom relations were structured through presidential proclamations and treaties. As a result, congressional acts like the IRA governing relations with Indians passed since the end of the treaty era depend on *specific* congressional authorization for agency rulemaking rather than the general authorization to the President contained in 25 U.S.C. § 9.

"It is a commonplace of statutory construction that the specific governs the general," *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384 (1992), a canon which is particularly pertinent where, as here, the general delegation of rulemaking authority is merely a vestige of a prior legal regime. *See id.* at 385 (declining to apply a general "saving" clause from the Federal Aviation Act of 1958 because it was "a relic of the pre-[Airline Deregulation Act]/no pre-emption regime."). The general delegation in 25 U.S.C. § 9 cannot supercede the more recent and specific scheme set forth by Congress in the IRA – one that expressly authorizes rulemaking authority for selected provisions while withholding (and thereby prohibiting) rulemaking authority for others, including Sections 465 and 479. To do so would render Congress' specific authorization for secretarial rulemaking in four discrete sections of the IRA mere surplusage. It would do the same for the plethora of rulemaking authorizations

contained in the 46 other acts that are codified in Title 25 of the United States Code.

B. The 1980 Regulations Provide no Support for the Secretary's New Interpretation of the IRA as Including "All Tribes"

Regardless of whether the 1980 trust acquisition regulations were authorized by Congress, *Chevron* deference is still not due to the Secretary's current position that the IRA's trust acquisition regulations apply to all recognized tribes. That is because the regulations do not disavow the IRA's temporal limitation and because the Secretary's own contemporaneous and consistent interpretation of these regulations specifically embrace the limitation.

1. The regulations do not interpret the IRA to avoid the "recognized [in 1934] tribe" test

The Secretary boldly proclaims that the 1980 trust regulations governing his authority to take land into trust for Indian tribes under Section 465 "extend to any Indian tribe that is recognized as eligible for Indian programs, with no limitation based on the tribe's status in 1934." U.S. Br. 10. The regulations, however, do no such thing – and the Secretary's own opinion at the time of the regulation and later confirms this. The Secretary points to 25 C.F.R. 151.2(b), which defines "Tribe" to mean "any Indian tribe * * *

which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs." U.S. Br. 28. The regulation further defines "Individual Indian" to mean "any person who is an enrolled member of a tribe." 25 C.F.R. 151.2(c)(1). While the Secretary correctly points out that "[n]either definition is tied to recognition status in 1934," U.S. Br. 28, nowhere do the regulations attempt to define or redefine the term "Indian" – which the IRA defines, as relevant here, as all persons of Indian descent "who are members of any recognized Indian tribe now under federal jurisdiction."

Most importantly, the Secretary ignores the very next section, 25 C.F.R. 151.3, which requires that: "Land not held in trust or restricted status may only be acquired for an Individual Indian or a tribe in trust status *when such acquisition is authorized by an act of Congress*" (emphasis added); and subsection (a) of part 151.3 only permits the Secretary to acquire land in trust for tribes "[s]ubject to the *provisions* contained in the acts of Congress which authorize land acquisitions." 25 C.F.R. 151.3(a) (emphasis added). Thus, the regulations merely refer back to the eligibility provisions of the IRA itself, without any attempt to redefine "Indian." Fairly read, these regulations do not purport to change or interpret the definition of Indian contained in the IRA – and the regulations certainly are not "flatly inconsistent" (U.S. Br. 29 n.4) with the temporal limitation.

Indeed, that the regulations leave untouched the IRA's temporal limitation has been confirmed by the Secretary on at least two occasions prior to the commencement of this litigation. On October 1, 1980, just two weeks after the regulations had been published in their final form, the Secretary undertook a detailed analysis of the very question presented here – whether the IRA requires an Indian tribe to have been under federal jurisdiction in 1934 to receive its benefits. In considering whether an Indian tribe is eligible for federal trust acquisitions under Section 465, the Secretary stated that "the definitions of 'Indian' and 'tribe' must be read together," and that to meet Section 479's "recognized tribe now under Federal jurisdiction" test in the definition of Indian, "the United States [must have] had a continuous course of dealing or some legal obligation in 1934." Memorandum from the Associate Solicitor dated October 1, 1980 at 2.[4] While the Secretary now complains that his 1980 opinion does not mention the regulations, U.S. Br. 29 n.4, their marked absence shows that the Secretary did not view the regulations as redefining or interpreting the definition of Indian in Section 479 to exclude the temporal limitation.

Fourteen years later, in 1994, the Secretary once again opined that "Section [479] of the IRA defined

[4] This opinion was one of four policy statements lodged with the Court by the Solicitor General on August 21, 2008 after the submission of the opening briefs of Petitioners. The other three are dated 1936, 1976 and 1994 and are discussed *infra*.

'Indians' not only as 'all persons of Indian descent who are members of any recognized [in 1934] tribe under Federal jurisdiction' and their descendants who then were residing on any Indian reservation, but also 'all other persons of one-half or more Indian blood.' "[5] Letter from the Acting Assistant Secretary to George Miller, dated January 14, 1994 at 3 (bracketed date in original). In sum, both the plain language of the regulations as well as the Secretary's own interpretation of them until this case, reveal that the Secretary does not interpret the IRA as authorizing trust for all tribes regardless of their status in 1934.[6]

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[5] The Secretary notes that this interpretation of Section 479 resembles this Court's own statement of the temporal limitation set forth in *United States v. John,* 437 U.S. 634, 650 (1978). In fact, the cited language is a *direct* quote from *John* replete with the "[1934]" insertion. While the Secretary here pooh poohs *John* as containing a "glancing reference" to the issue at hand, U.S. Br. 25, in 1994 the Secretary viewed it as controlling.

[6] Because these historic Department documents were never disclosed below, the First Circuit was incorrectly led to believe that "it is not seriously disputed that the Secretary has never *rejected* an application to take land into trust for a federally recognized tribe on the ground that the tribe was not recognized and under federal jurisdiction in 1934." Pet. App. 32. While the Secretary's brief cites that quote here, U.S. Br. 33, his October 27, 1976 response to the Stillaguamish Tribe puts that myth to rest. The Secretary *rejected* a request to, *inter alia*, take into trust certain fee lands on the ground that the tribe "was not administratively recognized on the date of that act, (June 18, 1934)." Letter from Acting Secretary to David Getches at 8. While the Stillaguamish decision was reversed by the Secretary four years later, it was on the basis that the Tribe possessed federal treaty rights predating the IRA, showing that "some type

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2. The Secretary has consistently rejected the interpretation of Sections 465 and 479 he proffers in this case

Even though the Secretary's trust acquisition regulations have no claim to judicial deference under *Chevron*, the Secretary's interpretation of Sections 465 and 479 could, nevertheless, still be eligible for respect "depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Mead,* 533 U.S. at 228 *quoting Skidmore v. Swift & Co.,* 323 U.S. 134, 139-140 (1944). The Secretary's new interpretation falls short of meriting even such lesser deference.

In its opening brief, the Town showed that the consistent position of the Secretary, from Commissioner Collier and Assistant Cohen at the time of passage of the 1934 Act to present has been the same as that of Petitioners. Since then, the Solicitor has placed into the record four official Department opinions analyzing the very question presented to this Court – all agree with Petitioners' position that the words "now under federal jurisdiction" contained in Section 479 of the IRA mean at the time of passage of the Act, and not later at the time of recognition.

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of obligation or extension of services to a tribe must have existed in 1934," thereby meeting the "recognized [in 1934] tribe now under federal jurisdiction" requirement (date in bracket added).

These internal memoranda and letters demonstrate that from soon after passage of the Act in 1934 through 1994, the Secretary's interpretation of the trust acquisition provisions of the IRA – consistent with its plain language – was that only Indian tribes that were federally recognized and under federal jurisdiction at the time of the passage of the IRA were eligible to have land taken into trust. These opinions show what Petitioners have been arguing all along – namely, that the position of the Secretary in this case is directly contrary to the actions and interpretation of the Secretary since passage of the Act in 1934.[7]

Three of the documents – the October 27, 1976 letter, the October 1, 1980 Memorandum and the January 14, 1994 Memorandum – have been discussed above. The fourth from Commissioner John Collier is particularly instructive. Collier, of course, was the Commissioner of Indian Affairs at the time of passage of the IRA, its principal architect and the drafter of the very provision in Section 479 at issue in this case. On March 7, 1936, the Commissioner

[7] While the Secretary now cites a few early Solicitor opinions as "support for the Secretary's regulatory definition," U.S. Br. 32, in 1980 he viewed the prior Solicitor opinions and others as consistent with his then legal position that a tribe's relationship with the federal government "must have existed in 1934" for trust taking to be authorized, and not contrary to the just issued regulations. *See* October 1, 1980 Solicitor Memorandum at 6 (citing Solicitor opinions from 1935, 1936, 1937, 1938, 1944 and 1971). Moreover, the Secretary does not and cannot claim that any of the tribes discussed in the Solicitor Opinions on which he relies were not 1934 Act tribes.

drafted a Circular concerning precisely which Indians and Indian tribes were entitled for inclusion in the IRA. His interpretation of Section 479 is identical to that of Petitioners in this case. The Secretary interpreted Section 479's language that the term "Indian . . . shall include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction" to unambiguously include "all persons of Indian descent who are members of any recognized tribe that was under federal jurisdiction *at the date of the Act*." Circular at 1 (emphasis added).[8]

These memoranda demonstrate that as soon as the IRA was passed and for at least the first 60 years thereafter, the Secretary interpreted his trust acquisition authority as applicable only to tribes that were federally recognized and under federal jurisdiction in 1934. An agency's contemporaneous construction of a statute it is charged with administering carries persuasive weight. Later conflicting interpretations are entitled to less weight. *Watt v. Alaska,* 451 U.S. 259, 272-73 (1981) ("The Department's current interpretation, being in conflict with its initial position is entitled to considerably less deference").

[8] It is thus hardly surprising that a year after the Circular, the Secretary denied assistance to the Narragansetts on the ground that "the Narragansett Indians have never been under the jurisdiction of the Federal Government and Congress has never provided any authority for the various Departments of the Government to exercise the jurisdiction which is necessary to manage their affairs." Town Br. 31-32; J.A. 20.

In sum, the position taken by the Secretary in this case is wholly unsupported by any regulation, rulings, prior opinions, or administrative practice[9] and is, thus, not entitled to any deference. *See Bowen*, 488 U.S. at 212 ("We have never applied [*Chevron*

[9] The Secretary comes up with only four tribes administratively recognized after 1934 for whom he has taken land into trust without a special act of Congress authorizing the conversion: the Narragansett (whose lands he holds in restricted trust), the Tunica-Biloxi, the Sault Ste. Marie Tribe of the Ottawa and Chippewa Indians and the Grand Traverse Band of the Chippewa (GTB). U.S. Br. 33-34. As demonstrated by Petitioners below, however, both the Sault Ste. Marie and the GTB were federally recognized and under federal jurisdiction in 1934 by virtue of treaties with the United States and, were, thus eligible for trust acquisitions under the IRA. *See* Post En Banc Oral Argument Br. of State Appellants, February 27, 2007 at 20-21. Thus, the Tunica-Biloxi are the *only* tribe for whom the Secretary has taken land into unrestricted trust in violation of the temporal limitation of Section 479. *But see, supra*, note 6 (Secretary correctly applied the IRA's temporal limitation to the Stillaguamish Tribe).

While the Secretary, in 1988, took the Settlement Lands into restricted trust only, the Town nonetheless acknowledges that the conversion was not authorized by the IRA and should not have occurred. The mistake, however, did not create Indian country, it did not revive aboriginal title in the Tribe or permit the Tribe to assert claims of territorial sovereignty over the Settlement Lands and it did not oust the State or Town of their jurisdiction over land within their borders. *Narragansett Indian Tribe v. Rhode Island,* 449 F.3d 16, 26 (1st Cir. 2006) (en banc) (explaining that even after the transfer of the Settlement Lands to the Secretary in trust, the Settlement Act "ensures that the State may demand the Tribe's compliance with state laws of general application" and "that the State may use its entire armamentarium of legal means for redressing compliance"), *cert. denied*, 127 S.Ct. 673 (2006).

deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice."); *Gonzales*, 546 U.S. at 258-75 (rejecting *Chevron* deference where regulation promulgated without authority and further rejecting as "unpersuasive" agency position under *Skidmore*).

II. NO AMENDMENT TO THE IRA REPEALS SECTION 479'S TEMPORAL LIMITATION

The Secretary cites the "Federally Recognized Indian Tribe List Act," 25 U.S.C. § 479a (the "List Act"), a 1994 amendment to Section 476 of the IRA, and the "Indian Land Consolidation Act," 25 U.S.C. § 2202 ("ILCA") as inconsistent with the "recognized [in 1934] tribe" limitation of Section 479 of the IRA.[10] Since none of the amendments modify a single word of the temporal limitation in Section 479, the Secretary urges this Court to find that the amendments repeal it *sub silentio* or by implication. There is nothing in any of the IRA amendments to suggest an implied repeal of the Section 479 temporal limitation. As such, they cannot fairly be read to repeal it.[11]

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[10] While the Secretary uses these acts as further "support" by Congress of his interpretation of Section 479, other amici are straightforward in claiming that these acts trump the 1934 Act's limitation.

[11] The Secretary and amici also cite other congressional acts outside the IRA involving Indians as support for superceding or disregarding the IRA's temporal limitation. While some of these acts do define Indian more broadly than the IRA, none have the

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First, by its express terms the List Act provides a definition of "Indian tribe" only "[f]or purposes of this title," and no other. The Act goes on to define "this Title" as "Section 479a" only. 25 U.S.C. § 479a. Thus, Congress painstakingly insured that its definition of Indian tribe in Section 479a, for the limited purpose of having one comprehensive list of tribes eligible for certain benefits, is not to be imported to Section 479. That Section 479a was specifically confined – and Section 479 unchanged – shows a congressional intent to affirm Section 479's temporal limitation. Otherwise, there would have been no reason to limit Section 479a's definition of Indian tribe to that specific section of the IRA only. The List Act itself does nothing more than require the Secretary to publish annually a list of all then-federally recognized Indian tribes. The List Act disavows any pretense of changing the definition of Indian or tribe contained in the IRA or any of the myriad federal acts providing programs or services to Indians.

Second, the 1994 amendment to Section 476 of the IRA – contained in Section 476(f) and 476(g) – likewise, is of no help to the Secretary. The amendment is to Section 476 of the IRA and not 479. It makes no change whatsoever to the definitional Section 479. Section 476 is entitled: "Organization of

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purpose and effect of creating Indian country and stripping state jurisdiction as does the IRA. Because these acts do not touch the IRA's definition of Indian, they certainly cannot repeal it.

Indian tribes; constitution and bylaws and amendment thereof; special election." It deals with a tribe's ability to constitute a government for its "common welfare" and to "adopt an appropriate constitution and bylaws." 25 U.S.C. § 476(a). The amendment referred to does not apply to any legislation; rather, it prohibits the executive branch from promulgating regulations or making any decision "with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to other federally recognized Indian tribes by virtue of their status as Indian tribes." 25 U.S.C. §§ 476(f), (g). It was not the executive branch that established the temporal limitation in Section 479; it was Congress. Moreover, the amendment applies only to executive branch discretion "by virtue of their status as Indian tribes." It says nothing concerning whether the entity *is* an Indian tribe under Section 479 of the IRA.

Third, the Secretary cites the 1983 ILCA as undoing Section 479's temporal limitation. All the ILCA does, however, is allow pre-1934 Act tribes that were eligible, but voted to opt out of the IRA pursuant to Section 478, to vote to come back in – nothing more. That is made entirely clear by the text of 25 U.S.C. § 2202, which states that: "The provisions of section 465 of this title shall apply to all tribes *notwithstanding the provisions of section 478* of this title; *Provided,* That nothing in the section is intended to supercede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of

land for Indians with respect to any specific tribe, reservation, or state(s)." (emphasis added). Section 478 is the only section that is superceded, and what the ILCA does is ensure that any tribe *to which the IRA was originally applicable in 1934* can come under the ILCA even if the tribe opted out of the IRA under Section 478 within a year of its passage. Had the ILCA intended to apply to all Indian tribes "notwithstanding" Section 479's temporal limitation it could have said so, the same way it did with respect to Section 478's opt out provision for IRA eligible tribes.

If a tribe comes under the ILCA (as opposed to the IRA), it may "adopt a land consolidation plan . . . for the purpose of eliminating undivided fractional interest in Indian trust or restricted lands or consolidating its tribal land holdings." 25 U.S.C. § 2203. It is for this purpose only that the ILCA defines a tribe. That is why, contrary to the Secretary's position, Congress refused to apply the ILCA to "all tribes" notwithstanding the temporal limitation in Section 479. In the definition section of the ILCA, Congress limited the definition of "Indian tribe" to include only those tribes for which the United States already holds land in trust,[12] and not "all tribes." 25 U.S.C.

[12] While NCAI amici (but not the Secretary) claims that this test is met because the Secretary has the Settlement Lands in "trust" for the Tribe, that assertion goes nowhere. NCAI Br. 8 n.4. That is because the "trust" into which the Settlement Lands have been placed is not a true trust. As the Secretary and all amici agree, unrestricted trust creates Indian country, where federal and tribal law largely trump state law. The 1,800 acres

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§ 2201(1). Moreover, rather than repealing the definition of "Indian" contained in Section 479, Congress *expressly reaffirmed* it – "(B) any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479). . . ."

The amendments to the IRA since 1934 do not accomplish an implied repeal. If Congress wished to remove the temporal limitation contained in Section 479, it knew exactly how. It could simply have deleted the word "now" or (as it did in Section 472) added the words "or hereafter" following "now." Since it has done neither, the temporal limitation contained in Section 479 remains intact.

III. THE SECRETARY WRONGLY READS THE SETTLEMENT ACT'S EXTINGUISHMENT PROVISIONS AS ALLOWING CLAIMS OF INDIAN SOVEREIGNTY OVER LAND THROUGHOUT RHODE ISLAND

In contrast to his lengthy and detailed examination of the language of the IRA, the Secretary steers clear of any real scrutiny of the language of the Settlement Act. He claims that there is "simply nothing in the text of the Settlement Act * * * that

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of Settlement Lands are the antithesis of Indian country – they are subject to "civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708(a). Thus, the restricted "trust" here is simply not the type of vehicle to which the ILCA refers for its purpose of creating and consolidating Indian country.

accomplishes * * * a repeal or curtailment" of his trust authority. U.S. Br. 41. On the contrary, since the Settlement Act "expressly provided that the Tribe would have the same right to petition for recognition and services as other groups," the Secretary concludes that the Tribe is eligible to have land taken into trust by the Secretary on its behalf. *Id.* Moreover, the Secretary proclaims that nothing in the Settlement Act prevents land so converted from becoming "Indian country" over which the United States and the Tribe, rather than Rhode Island, would have jurisdiction. U.S. Br. 41-42.

The Secretary's interpretation of the Settlement Act has less to do with a fair reading of that statute than with his repeatedly-expressed "mandate" to treat all federally recognized tribes the same. *See, e.g.* U.S. Br. 37 (reciting that federal agencies are prohibited from promulgating regulations that either enhance or diminish the privileges and immunities available to one federally recognized tribe relative to another). Congress, however, not the Secretary of the Interior, controls the privileges and immunities afforded to federally recognized tribes. Congress frequently enhances, curtails or even eliminates tribal privileges and immunities.[13] When it does, the Secretary must adhere to its directive, even if that

[13] Indeed, one need only look to the other settlement acts cited by the Secretary to see this principle in action. U.S. Br. 46-51. In each of those settlement acts, Congress placed limits on the traditional reach of Indian territorial sovereignty.

results in disparate treatment among tribes. The Settlement Act contains provisions that limit the traditional "privileges and immunities" of the Narragansett Indian Tribe.

The Secretary and the Tribe all but ignore the Settlement Act's express extinguishment of aboriginal title and they do not respond to the argument that aboriginal title and Indian trust title are essentially the same form of land tenure. Neither the Secretary nor any Indian amici, however, dispute that aboriginal title and trust title are both rights of use and occupancy characterized by a tribe's ability to *exercise sovereign dominion over land* without fee simple ownership of it. Indeed, the resulting jurisdictional and sovereignty ramifications for all of the players in this saga – the United States, the Tribe, the State and the Town – are identical under either land tenure regime. It defies law and logic to conclude that Congress might have so categorically extinguished one form of Indian land tenure only to allow it to be replaced, through agency action, with precisely the same form of Indian land tenure under a different name.

The Secretary and the Tribe claim that decisions of this Court support that position. The Secretary interprets *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005) as blanket authorization "for tribes 'to reestablish sovereign authority over territory.'" U.S. Br. 43. He fails to mention that the Oneida lost their sovereignty over land through

laches and not an act of Congress. That distinction makes all the difference. *See* Town Br. 45-48.

The Tribe additionally cites *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998), as supportive of the Secretary's ability to acquire trust property for the Tribe. Tribe Br. 11, 19. The Secretary there acquired land in trust for the Band under Section 465 of the IRA, even though Congress had previously extinguished the Band's aboriginal title through the General Allotment Act.

Cass County does not, as the Tribe asserts, stand for the proposition that any tribe lacking a "unilateral possessory right" to assert sovereign control over land may, nevertheless, regain such control through the trust process. Tribe Br. at 11. Instead, *Cass County* simply demonstrates that when a tribe loses its land through federal allotment of the 1880's, as the Chippewa did, the resulting extinguishment by Congress of Indian or aboriginal title can only be undone by a subsequent act of Congress. For the Chippewa and other tribes that were federally recognized and under federal jurisdiction in 1934 (and thus, targets of the now-repudiated allotment policy), the IRA *is* that subsequent act of Congress. Tribes whose aboriginal title was specifically extinguished by Congress *after* passage of the IRA, like the Narragansett, cannot rely on the general provisions of the previously-enacted IRA to revive their territorial sovereignty. Without a separate act of Congress that authorizes trust acquisitions or otherwise revives their ability to exercise territorial sovereignty over newly acquired

land, the Secretary is without legal authority to undo the prior extinguishment.

IV. IF TRUST IS ALLOWED, STATE JURISDICTION MUST BE PRESERVED TO HARMONIZE THE IRA WITH THE SETTLEMENT ACT

While the Secretary argues that there is nothing in the Settlement Act that serves to prevent or even curtail his ability under the IRA to take land into unrestricted trust, the Settlement Act's extinguishment provisions must be read to at least limit the Secretary's trust power, by preventing the creation of Indian country in Rhode Island for the first time in its constitutional history. *See Carcieri v. Kempthorne*, Pet. App. 71-81 (Howard, J. and Selya, J. dissenting).

The presumption against repeals by implication can be overcome by an irreconcilable conflict between statutes. If two federal statutes are "repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." *Pipefitters Local Union No. 526 v. United States*, 407 U.S. 385, 432 (1972). Nor is it necessary for this Court to impliedly repeal a statute in whole. A repeal by implication obtains only to the extent necessary. *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 457 (1945) ("Only a clear repugnancy between the old law and the new results in the former giving way and then only pro tanto to the extent of the repugnancy.").

The 1978 Settlement Act's land tenure provisions, which extinguish the Tribe's aboriginal title and rights and interests in land throughout the State, preclude the Tribe from exercising sovereignty over land in Rhode Island. Section 465 of the 1934 Act, on the other hand, permits the establishment of tribal sovereignty over land through trust. These two acts create antithetical jurisdictional and sovereignty regimes. Accordingly, the provisions of the later-enacted Settlement Act that extinguish the Tribe's right to exercise territorial sovereignty and preserve the State and Town exercise of their jurisdiction within their borders are repugnant to Section 465 of the earlier passed IRA. The IRA's trust provisions must, therefore, give way to the extent they conflict with the Settlement Act's extinguishment of Indian territorial sovereignty.

This Court endeavors, to the extent possible, to read antagonistic statutes together in a manner that will minimize the aggregate disruption of congressional intent. *Morton v. Mancari,* 417 U.S. 535, 551 (1974). While the Secretary's proposed taking of the Parcel into unrestricted trust would create prohibited Indian territorial sovereignty in Rhode Island, there is no legal necessity for the Parcel or any other land taken into trust to create Indian sovereignty or divest State jurisdiction. Both the Secretary's ability to take land into trust under the IRA and the Settlement Act's prohibition on the re-creation of Indian sovereignty over land through the establishment of Indian country can be met and the statutes harmonized.

To this end, Petitioners argued below, and the Town suggests again here, that the way to harmonize Section 465 of the IRA (assuming *arguendo* that the IRA applies) with the Settlement Act is to read the two acts together to permit the Secretary to take the Parcel into trust under Section 465 but to require that it be subject to the full application of the State's civil and criminal laws and jurisdiction – the very same "restricted trust" jurisdictional regime that currently exists on the Settlement Lands right across the street. Reading the two statutes to preserve State jurisdiction over the Parcel honors the extinguishment provisions of the Settlement Act while, at the same time, does nothing to offend the IRA.[14]

Indian land was not lost in Rhode Island through allotment. Instead, it was lost through land transfers in alleged violation of the Non-Intercourse Act. The Settlement Act, not the IRA, is the congressionally-mandated remedy for those losses. Harmonizing the IRA with the Settlement Act, however, provides the Tribe with the benefit of both acts without divesting the State of its jurisdiction. The Tribe gets its land in trust, property tax free, and preserves its eligibility for the other benefits of the IRA. To the extent that the IRA seeks to restore Indian lands, that goal is honored by the Settlement Act's grant of 1,800 acres

[14] The harmonization would also have no impact on the proposed Indian housing. The housing has been permitted and complies with State law and local ordinance. There is no need for the Parcel to be in trust or be converted to Indian country.

to the Tribe. Any trust acquisition, however, must be restricted such that State laws and jurisdiction fully apply. This is the only way to preserve the integrity of the Settlement Act's extinguishment of Indian territorial sovereignty in Rhode Island.

CONCLUSION

The IRA does not include the Narragansett and the Settlement Act does not permit the ouster of the State's laws and jurisdiction in favor of Indian territorial sovereignty. As a result, the Secretary cannot acquire land in unrestricted trust for the Tribe. The judgment of the United States Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

Town of Charlestown
By Its Attorney,

JOSEPH S. LARISA, JR.*
Assistant Solicitor for Indian Affairs
TOWN OF CHARLESTOWN
55 Dorrance Street, Suite 301B
Providence, RI 02903
(401) 743-4700

**Counsel of Record*